No. 636.
Brief of Miller for D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1898.

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CHARLES H. INGWERSEN,
vs.
THE UNITED STATES.

In Error to the District Court of the United States for the Northern District of Illinois.

Hon. P. S. GROSSCUP, D. J.

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STATEMENT.

This writ of error raises the question of the construction, validity and constitutionality of certain provisions of the Act of Congress of June 13, 1898, known as the "War Revenue Act."

The plaintiff in error was charged by criminal information in the District Court with violating the provisions of Section 6 and Schedule A of said Act of June 13, 1898, which imposes a tax "upon each sale, agreement of sale, or agreement to sell, any products or merchandise at any exchange or board of trade, or other similar place"—in that the plaintiff in error *at the Union Stock Yards, Chicago*, particularly described in the paper marked "Exhibit A," which is a part of said information, *did make sale of certain cattle* to one Moog, and did deliver to said purchaser a memorandum of the sale, *without then and there having the proper stamps affixed thereto* as required by said Act. (Printed trans. 2–5.) The United States Attorney made a part of the information as Exhibit A, a particular description of the place,—the Union Stock Yards, at Chicago,—at which the sale in question was made; and also a copy of the Charter and By-laws of the Union Stock Yard and Transit Company, which is a corporation for profit, and owns, maintains and operates the stock yards in question. (Pr. trans. 4–13.)

Distinctions between the case at bar and the Board of Trade cases recently argued herein.

The case at bar differs from the Board of Trade cases of *Nicol* v. *Ames, United States Marshall*, No.

435, and *Ex parte George R. Nichols*, No. 4 original, and *Skillen* v. *Ames*, *United States Marshall*, No. 625 (which were argued and submitted at the present term) in these respects:

In the Board of Trade cases, the sales were all made upon the floor of the trading room of the Chicago Board of Trade, to which, and to the privileges of trading upon which, only members of the Board of Trade are admitted. There was no question made that those sales were *within the terms* of the Act;—that they were made at an Exchange and Board of Trade. But in the case at bar the sale of cattle in question was made in one of the pens of the Union Stock Yards: and there is the question involved which is not in said Board of Trade cases, whether the sale here was, as the District Court here held, at a "similar place." If the court holds, as the proper construction of the Act in question, that the sale here in question was not made "at any exchange or board of trade or other similar place," then the decision of this writ of error in our favor may be made without necessarily deciding the question of constitutionality.

The learned Circuit Judge, in his opinion in the *Nicol case*, in passing upon and sustaining the constitutionality of the Act as applied to sales on the

floor of the Chicago Board of Trade, found the tax to be upon the *privilege of trading there* which is confined to members.

> *Nicol* v. *Ames*, 89 Fed. Rep. (Nov. 1, 1898), 144.

If in the *Board of Trade Cases* the provisions in question of the Revenue Act are here held to be unconstitutional, that will determine the case at bar on that question in favor of plaintiff in error. But if in those cases the Act is held constitutional, that decision will not necessarily determine either the application of the Act to the sale in question in this case or its constitutionality as applied to such sales. If this court should hold upon the question of construction that the sale of cattle here in question was a sale "at an exchange or board of trade, or other similar place," and was subject to this tax, then the question of its constitutionality, as applied to this sale, will not necessarily be determined by a decision that the tax upon sales on the board of trade is constitutional, if such decision should be reached. As will be seen, there is no such *privilege* in the sale of cattle in the case at bar or other sales of live stock at stock yards. Any person can go there and sell or buy cattle or other live stock. The farmer or other person who has live stock to sell or who desires to

buy, may sell or buy as at the farm of the owner or other place where the live stock may be.

The material portions of said Act are as follows:

ADHESIVE STAMPS.

"*Section* 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters and things mentioned and described in Schedule A of this Act, or for or in respect of the vellum, parchment or paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in said schedule.

SCHEDULE A.

STAMP TAXES.

"*Upon each sale, agreement of sale, or agreement to sell any products or merchandise at any exchange or board of trade, or other similar place*, either for present or future delivery, for each one hundred dollars in value of said sale,

or agreement of sale, or agreement to sell, one cent, and for each additional one hundred dollors or fractional part thereof in excess of one hundred dollars, one cent; *Provided*, that on every sale or agreement of sale, or agreement to sell, as aforesaid, there shall be made and delivered by the seller to the buyer a bill, memorandum, agreement, or other evidence of such sale, agreement of sale, or agreement to sell, to which there shall be affixed a lawful stamp or stamps, in value equal to the amount of the tax on such sale. And every such bill, memorandum, or other evidence of sale or agreement to sell shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers; and any person or persons liable to pay the tax, as herein provided, or anyone who acts in the matter as agent or broker for such person or persons, who shall make any such sale or agreement of sale, or agreement to sell, or who shall, in pursuance of any such sale, agreement of sale, or agreement to sell, deliver any such products or merchandise without a bill, memorandum, or other evidence thereof as herein required, or *who shall deliver such bill, memorandum, or other evidence of sale, or agreement to sell, without having the proper stamps affixed thereto, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall pay a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned not more than six months, or both, at the discretion of the court.*"

The Information; Motion to quash; Demurrer; Rulings thereon; Rulings on trial; Instructions; Conviction and Judgment.

The information, as preferred, contained two counts; but as to the first count there was a *nolle* entered, and it is not now material. In the second count it was charged that the defendant made a sale of cattle at the Union Stock Yards particularly described in Exhibit A, which is made a part of said information, and delivered the same to the purchaser and did deliver to the purchaser a memorandum of the said sale *without then and there having the proper stamps affixed thereto for denoting the payment of the internal revenue tax upon said sale and memorandum, as required by said Act, and did refuse, fail and neglect to affix any such stamps to said memorandum* (Pr. Trans. 3.)

The defendant Ingwersen moved to quash the information, and each count thereof, and also demurred to each count on the grounds, (1) that the information did not charge or state any offense; (2) that the said sales made by defendant in the information mentioned are not within the provisions of said act; (3) that the said sales, agreements of sale, or agreements to sell in the said information mentioned were not, nor was either of them, a sale, agree-

ment of sale, or agreement to sell "any products or merchandise at any exchange or board of trade, or other similar place," within the meaning of Schedule A of said Act of Congress; and (4) that the said Act of Congress, and the respective provisions thereof in said information mentioned, are in violation of the Constitution of the United States and void (Pr. Rec. 14-16).

The Court, upon argument, denied the motion to quash, and overruled the demurrer; to each of which rulings the defendant preserved exceptions (Id., 17).

Thereupon the defendant pleaded not guilty and was put upon his trial before a jury, and on such trial the Government entered a *nolle* as to the first count in the information (Pr. Trans. 18, 33). The trial proceeded on the second count. The prosecution proved the making of the sale, alleged in the second count of the information, at the Union Stock Yards, Chicago, and that the Union Stock Yards where said sale was made, was accurately described in Exhibit A to the information; and that the memorandum in question which was a "scale ticket" or certificate of the weighmaster of the Union Stock Yard Company of the weight, was made by the Union Stock Yard Company, and delivered to defendant

and by defendant to the purchaser; and that no stamp was affixed to said memorandum of said sale. (Pr. Trans. 29-34.) The evidence for the Government also showed the differences between a board of trade or exchange and the Union Stock Yards, and the course and methods of business at each. (Pr. Trans. 35 to 45.) We shall point out those differences further on. No evidence was introduced for defendant.

The defendant submitted to the court successively certain requests for instructions to the jury, each of which the court successively refused; and the defendant preserved exceptions to each of these rulings. (Pr. Trans. 45-46.)

The court instructed the jury peremptorily to return a verdict of guilty; to which ruling exception was duly taken. And the verdict of guilty as instructed by the court, was accordingly entered. (Id. 46.) The defendant moved for a new trial, which was overruled, and an exception to such ruling was preserved. (Id. 18, 46.) The defendant also moved for judgment *non obstante veredicto*, and in arrest of judgment, each of which were overruled and exceptions thereto preserved. (Id. 19, 46, 47.) Judgment upon the verdict was thereupon entered that defendant pay a fine of $500, and that he stand committed to the county jail of Cook County, Illi-

nois, until said fine is paid, or he is otherwise discharged by law. To this an exception was preserved. (Id. 19, 47.) And to review said judgment this writ of error is sued out.

SPECIFICATION OF ERRORS.

1. The court erred in denying and in not sustaining the motion to quash the information.

2. The court erred in overruling and in not sustaining the demurrer to the second count of the information.

3. The court erred in holding that the sale referred to in the second count of the information was made at an exchange or board of trade or other similar place, within the meaning of Schedule A of the Act of Congress in question.

4. The court erred in refusing the following instruction requested by defendant:

> "The court instructs you, Gentlemen of the Jury, that, in view of all the evidence in this case, the sales, agreements of sale, and agreements to sell in the information mentioned, were not, nor was either of them, a sale, agreement of sale, or agreement to sell any products or merchandise at an exchange or board of trade, or other similar place, within the meaning of Schedule A of the act of Congress approved June 13, 1898, entitled 'An Act to Provide Ways and Means to Meet War Expenditures, and for Other Purposes.'"

5. The court erred in refusing the following instruction requested by defendant:

"The court instructs you, Gentlemen of the Jury, that the Union Stock Yards in Chicago, Illinois, and the pens inclosed therein, which have been referred to in the evidence in this case as constituting the place at which sales, agreements of sale and agreements to sell, and each of them mentioned in the information herein, were made, did not constitute an exchange or board of trade, or other similar place, within the meaning of Schedule A of the certain Act of Congress approved June 13, 1898, entitled 'An Act to Provide Ways and Means to Meet War Expenditures, and for Other Purposes.'"

6. The court erred in refusing the following instruction requested by defendant:

"The court instructs you, Gentlemen of the Jury, that the Act of Congress approved June 13, 1898, entitled 'An Act to Provide Ways and Means to Meet War Expenditures, and for Other Purposes,' in so far as it purports to apply to sales, or agreements of sale, or agreements to sell live stock at the Union Stock Yards, Chicago, Illinois, conducted as the evidence shows, the sales mentioned in the information were conducted, is in violation of Section 8 of Article I of the Constitution of the United States, requiring that all duties and imposts and excises shall be uniform throughout the United States; and is also in violation of Section 9 of Artice I of the Constitution of the United States, requiring that no direct tax shall be laid unless in proportion to the census or enu-

meration thereinbefore directed to be taken and that no tax or duty shall be laid upon articles exported from any state.

7. The court erred in giving the following instruction to the jury. (Pr. trans. 46):

> "The law question in this case, Gentlemen of the Jury, was submitted to the court on the demurrer to the information. The only question was whether these stock yards was an exchange or a place similar to an exchange. If it was, the transactions on the stock yards are taxable under the revenue law. The court has held that it was such a place, and this proceeding is only to carry out the judgment of the court, so that an appeal can be taken and the question determined by the Supreme court. For that reason I will instruct you that it is your duty—that the evidence in this case shows that this defendant has violated the law; that the stock yards is a place similar to an exchange, and transactions on the stock yards must be evidenced by a memorandum in writing. There was such a memorandum, but it was not stamped. The failure to stamp it is a violation of the law."

8. The court erred in giving the following instruction to the jury. (Print. trans. 46):

> "I instruct you, Gentlemen of the jury, to return a verdict of guilty."

9. The court erred in holding that the provisions of Section 6 and Schedule A of said Act were not in violation of the Constitution and void.

10. The court erred in holding that the provisions of Section 6 and Schedule A of said Act of Congress as applied to the sale in question, were not in violation of Section 8 of Article One of the Constitution of the United States, which provides that all duties, imposts and excises shall be uniform throughout the United States.

11. The court erred in holding that Section 6 and Schedule A of said Act of Congress were not in violation of Section 9 of Article One of the Constitution, which provides that no direct tax shall be laid unless in proportion to the census or enumeration thereinbefore directed to be taken; and in holding that Section 6 and Schedule A of said Act of Congress were not in violation of Section 2 of Article I, of the Constitution, which requires that direct taxes shall be apportioned among the several states, according to their respective numbers.

12. The court erred in not holding that Section 6 and Schedule A of said Act, as construed and applied by the court, deny to plaintiff in error the equal protection of the laws.

13. The offense of which the defendant was adjudged guilty was the making of a sale of merchan-

dise at a place similar to an exchange or board of trade without having the proper stamps affixed to the memorandum of such sale; and the words of said Schedule A, "or other similar place," do not define or describe any place with sufficient certainty to describe or define or create any offense or part of any offense, or impose any obligation upon this defendant or justify a conviction herein. And the District Court should have so held.

14. The court erred in instructing the jury to return a verdict of guilty.

15. As to each of said motions—for a new trial, for judgment *non obstante veredicto*, and in arrest of judgment,—the court erred in denying the same.

16. The court erred in rendering judgment against the defendant.

BRIEF AND ARGUMENT.

I.

The words "at any exchange or board of trade or other similar place," in Schedule A of the Act in question, refer to the place of sale; and they mean the room or floor or place provided by associations of that kind for trading among their members, and to the privileges of which only members are admitted. And the tax levied is only upon sales at those places.

1. The terms exchange, and board of trade, are used in two senses: (1) of an *association* of persons, which, by its rules or by-laws, regulates the business conduct of its members; and which usually provides for its members a room for their buying and selling with each other, to which only members are admitted to the privilege of buying and selling. And (2) of the *room or place* so provided by such an association. Bouvier Law Dic. (Rawle's Ed.), title, Stock Exchange. And when used in the latter sense, the term exchange is frequently contracted to 'Change or "on 'Change." And so a membership is frequently termed a seat.

It is an exchange or board of trade in this latter sense that is meant by the words in Schedule A of the Act in question.

Their names usually designate them as an exchange or board of trade, for instance; the London Stock Exchange; the New York Stock Exchange; the New York Produce Exchange; the St. Louis Merchants' Exchange; the New Orleans Cotton Exchange; the Chicago Board of Trade; the Kansas City Board of Trade. But in the names of some these words do not appear. For instance, the Milwaukee Chamber of Commerce; the Minneapolis Chamber of Commercé; the Philadelphia Board of Stock Brokers; the San Francisco Stock and Exchange Board, etc. Hence the use in the Act of the words "or other similar place."

But a distinguishing feature of each of these exchanges or boards of trade, or other similar places, when the term applies to a place at which sales are made, is, that it is a room or place for buying and selling, which is provided by the association for its members and to the privileges of which only its members are admitted.

This is a fact of common knowledge, and appears in adjudged cases and works of standard authority; and must be held to have been known to and in contemplation of Congress in passing the Act in question. It appears in the following among other authorities: Dos Passos, Stock Brokers, 88, 208–9; Melsheimer & Laurence, Stock Exchange, 1–2; Bisbee &

Simonds, Produce Exchange, 71; *Speight* v. *Gaunt*, L. R. 22, Ch. Div. 724 per JESSELL, M. R.; *Leech* v. *Harris*, 2 Brewst., 575, 587; *Metropolitan G. and S. Exch.* v. *Board of Trade*, 15 Fed., Rep. 849.

In *Melsheimer & Laurence on the Stock Exchange*, pp., 1–2, it is said that "members alone (and their clerks), have a right of entry to the Stock Exchange for the transaction of business."

In *Bisbee & Simonds*, Law of Produce Exchange, p. 71, it is said that "no member receives any pecuniary profit from the corporation or from its capital or revenue, *except such advantage, in the way of trade, as may result from the right to enter the room of the Exchange and there transact business.*"

Mr. DOS PASSOS, (Stock Brokers, p. 88), says that "a seat in one of these bodies is a species of incorporeal property—a personal, individual right to exercise a certain calling in a certain place."

In *Speight* v. *Gaunt*, L. R. 22, Ch. Div., 724, JESSELL, M. R. mentions the fact that if a man desires to buy stock on the Stock Exchange it is absolutely necessary for him to employ a stock broker.

In *Leech* v. *Harris*, 2 Brewster, 575, 587, the court, in defining the Philadelphia Board of Brokers, say that the members "have associated themselves to provide a common place for the transaction of their individual business."

In *Metropolitan G. & S. Exch.* v. *Board of Trade*, 15 Fed. R. 849, the court says of the Chicago Board of Trade, that "it does not and is not by its powers, authorized to deal in any kind of commodities, but it has provided a large exchange room, fitted up with suitable accommodations, where the members meet at stated times and buy and sell among themselves."

In Bouvier's Law Dictionary, a Stock Exchange is defined as a building or room in which stock brokers meet to transact their business of purchasing or selling stocks.

In the Century Dictionary an exchange is defined as "a place where the merchants of a city in general, or those of a particular class, meet at certain hours daily to transact business with one another by purchase and sale."

With such exchanges or boards of trade, which provide such places for trading to their members, the chief privilege of membership is access to such room or floor of the exchange for the purpose of trading theron. It is chiefly the necessity and value of having that right to enter and trade there, which compels or induces brokers to join, and which gives the great value to memberships or seats. And the principal and effective means, which exchanges providing such trading rooms have, of disciplining their mem-

bers, is the power to deprive them of such access and right to trade upon the floor of the exchange.

It is believed that there is no exchange or board of trade, or other similar place, in the United States, at which buying or selling is done, where the privilege to enter and trade there is not confined to members or their clerks.

The evidence in this case shows (and this court can look at the evidence because the court instructed the jury to return a verdict of guilty) that an exchange or board of trade, as a *place* of sale, is a room provided by the association to its members for trading among themselves, and that the privilege of there buying and selling is confined to the members of the association. Mr. BAKER, a witness for the prosecution, testified that he was on the Chicago Board of Trade for a number of years; that the Board of Trade is a room or hall provided in which the members and their duly accredited employees buy and sell cereals and provisions. That the goods which are the subject of sale are not there present. That the liberty of going upon the floor of the Board and buying and selling there does not exist except to members, and that any business transacted on the Board of Trade must be transacted by or through a member of the Board, and that the trades on the Board of Trade are carried on within what is known as this Exchange or Board

of Trade Hall; that sales on the Board of Trade are public sales—that is, any member or his employee present or having the desire to hear, may hear the sale. (Pr. Rec. 35, 36, 38.) And his evidence is that the above is a fair description of an exchange as a place "at which buying and selling is done." (Id. 37.)

Plainly the words "any exchange or board of trade" in the Act refer to such a place of sale,—to the trading room or floor provided by such an association, the privileges of which are confined to members. That is put beyond question by the connection in which they are used, viz.: "*at* any exchange or board of trade, *or other similar place.*" And plainly the words "exchange" and "board of trade" are themselves used of similar places. There is but one *kind* of place prescribed. That, too, is shown by the use of the words "or other similar place."

Mr. Solicitor General RICHARDS, in his brief for the government in the *Nicol case* (p. 19), states that the Chicago Board of Trade owns a building which cost $1,800,000., and that it has about 1,900 members, and the initiation fee is $10,000.; and (Id. p. 20) that "*visitors are not permitted to negotiate or transact any business in the Exchange rooms*" (citing Bisbee & Simonds on Produce Exchanges, p.

323). And thereupon the learned counsel draws this conclusion (p. 21):

> "I think it sufficiently appears from what I have said that the seller on an exchange enjoys facilities or privileges which the outsider does not. It is in view of these privileges, if not because of them, that this tax is levied. It is on the sale or agreement to sell under special or exceptional conditions that the charge is imposed. The tax is not a tax upon the memorandum, or upon the commodity sold, or upon the occupation of selling; it is not a tax upon the sale or agreement to sell a part from the privilege enjoyed in making the sale on an exchange, but it is upon the sale as made, on an exchange, under the conditions and with the privileges inseparably connected with such sale."

Counsel thus felt compelled to draw the line defining the place at which the sales which are subject to the tax must be made. And the line so drawn does not include, but excludes from the tax, the sale of cattle here in question as we shall show. The "facilities or privileges" which "the seller on an exchange enjoys," and "which the outsider does not," which counsel so regards the distinguishing feature, is the right to enter and sell and buy upon the exchange, *i. e.* the room or floor where the selling and buying is done, which "the outsider" does not have.

In other words, Mr. Solicitor General here gives to the Act, if we understand him, the construction which we contend for, viz., that "an exchange or board of trade, or other similar place," within the meaning of the Act is a place for selling and buying, from the privilege of trading at which "outsiders" *i. e.* non-members, are excluded. By that token, the sale of cattle in question by plaintiff in error was not subject to the tax because it was not made at an exchange or board of trade, or other similar place. And in order to bring the sale in question within the tax, counsel must break down the distinction which, in the *Nicol case*, he found it necessary to recognize. And if that distinction is given up, in an attempt to bring sales of live stock in the pens of the Union Stock Yards within the tax, no other can be found on which any such classification of the subjects of the tax can be based as is required to sustain the tax as uniform. Counsel will then find new difficulties in the question of constitutionality.

And the learned Circuit Judge, in his opinion in the *Nicol case*, recognized the same line of distinction and classification that it was the privilege, which members of an exchange or board of trade had, of entering and trading in the hall of the association

that marked the sales which are here the subject of the tax.

2. The words "or other similar place" in Schedule A of the Act do not bring within the tax, but exclude therefrom, sales at any different place. The same definition and line of distinction applies to those words. It is a place where the privilege of entering and buying and selling is confined to certain persons and where the "outsider" is excluded from such privilege.

The rule is that when general words follow an enumeration of particular cases, such words apply only to cases of the same kind as those expressly mentioned. *Harlow* v. *Tufts*, 4 Cush. 453. But the word "similar" is express and makes resort to the rule unnecessary.

But these words "or other similar place" show that the previous words "exchange" and "board of trade" are used synonymously, *i. e.* they have the same distinguishing characteristics. "Exchange" is not a broader nor a narrower term than "board of trade." It is other similar place, not places; and similar to one thing, not to two different or dissimilar things. And the essential feature common to all as places of sale, within the meaning of the Act, is that the privilege of entering and selling and buying there is confined to members.

If these words "or other similar place" are to be construed as the District Court construed them, we shall later contend that they are void for indefiniteness.

II.

The Union Stock Yards at Chicago or its pens, in one of which the sale in question was made, or other similar stock yards in the United States where live stock is received and where it is sold by the owner or by his agent, are not exchanges, or boards of trade, or other similar places, within the meaning of the Act in question.

At the Union Stock Yards, there is no room or place provided by any Exchange or Association for trading by its members. The Stock Yards, as averred in the information herein, are owned, managed and controlled by the Union Stock Yard and Transit Company, a stock corporation for profit, of which plaintiff in error is no part (Pr. trans. 3 to 9). There is no privilege here at all such as is conceived to exist in the case of sales on the floor of a board of trade or "on 'Change."

Any person is at liberty to send, take or receive cattle into said yards, and there place, or have the same placed in a pen or pens, and there sell any cattle belonging to him or which he has the right to sell. And any person desiring to buy has access to such pens for that purpose, and, has the liberty to

purchase, and sales there are private sales. (See information, Exhibit A, Pr. trans. p. 4).

The information contains as a part thereof, a description of the place where it is averred the sale in question was made, as follows:

> "The Union Stock Yards described in this information at the respective times therein mentioned, and theretofore and since, covered and cover three hundred and thirty-five acres of land situated between Thirty-ninth street and Forty-seventh street and Halsted street and Ashland avenue, in the City of Chicago, County of Cook and State of Illinois, of which two hundred acres are covered by pens, which are made by fences surrounding and enclosing the same, there being alleys running through the yards separating the pens, into which alleys gates lead from the pens. The number of the pens is about five thousand and they are in size respectively from eight feet square to fifty feet square. Railway tracks belonging to and operated by the Chicago Junction Railway Company, which connect with all the lines of railway to the City of Chicago, extend into the yards, over which cattle, hogs and other live stock received at or shipped from the Union Stock Yards are carried. Upon the arrival of cattle, hogs or other live stock at the Union Stock Yards consigned to the commission merchant at the Union Stock Yards, *such cattle, hogs or other live stock are placed by the owner or consignee thereof, or his or its agents, in one or more of the pens, and are*

there cared for, fed and watered by such owner or consignee. Any person is at liberty to send, take or to receive cattle, hogs or other live stock into the Union Stock Yards, and there place or have the same placed, in a pen or pens, care for the same, and there sell any cattle belonging to him or which he has the right to sell. Any person has access to the pens containing cattle, hogs, or other live stock for the purpose of buying the same, and has liberty to purchase or negotiate for the purchase thereof. Sales of cattle, hogs and other live stock in the yards are at private sale. Commission merchants having cattle, hogs or other live stock in a pen or pens in the yards seek and solicit a buyer therefor, and when a proposed buyer is so found, take him to the pens in which such live stock is contained and there exhibit such live stock, *and to such proposed buyer, or to any person who may come to said pen and who may desire to buy, such live stock is sold in the pen in which they are yarded.* Sales of cattle, hogs and sheep in the yards are by weight, and upon a sale thereof being made such livestock is taken by the owner or commission merchant having charge thereof from the pen in which it is confined to a scale or scales in the yard and belonging to the Union Stock Yard and Transit Company, and are there weighed by a weighmaster employed by the Union Stock Yard and Transit Company, and in charge of the scale in which said livestock are weighed and the weight of such livestock is thereby determined as the weight for which the purchaser pays upon his purchase,

and the amount of the purchase price at the price per pound or hundred pounds fixed in such sale is thereby determined." (Print. Trans. 3, 4, 5.)

We admit that the above description does not meet the definition or meaning of an exchange or board of trade or other similar place. Whether it would come within the broader definition of a "market," which is different from and much broader than an exhange or board of trade or other similar place, is not perhaps material. If it did, it would not, for that reason, be within this tax, because there are many markets which are not exchanges or boards of trade or other similar place.

Mr. Baker, for the prosecution, testified that the above description contained in the information, was a correct description of the stock yards so far as it went, and stated substantially the method of doing business in the stock yards (Pr. Tr. 34). And he further testified, upon cross-examination, that anybody is at liberty to deal at the Union Stock Yards and their pens, either as a buyer or as a seller of live stock (Id. 35). That on the Board of Trade neither the Board of Trade itself nor the merchants who deal thereon have the responsibility for the care and safe keeping of the property dealt in while it is the subject of the deal, but that at the stock yards

the commission man, receiver or consignee is responsible for the custody and care of the stock, to feed, water and care for them (Id. 37). That a very small proportion, from five to ten per cent. of the animals brought into the stock yards are bought by the commission men; that the class of cattle that the commission men buy are thin cattle, known as "stockers" or "feeders," which they purchase for their customers to take back into the country; and that the fat cattle are bought by the representatives of the eastern buyers located at Chicago and the slaughterers. That practically all of the live stock are shipped to commission men, but that very frequently the owner consigns the stock to himself and then turns it over to a commission man for sale, and in some few isolated instances sells it himself. That the custom is for the commission man who receives the live stock,—he knows about what class of buyers will handle each class,—to go with his proposed buyer to the pens containing the stock. (Pr. Trans., 37–45).

It will be observed that the information and evidence herein show that the live stock received at the Union Stock Yards upon their arrival "are placed by the owner or consignee thereof, or his or its agents, in one or more of the pens, and are there cared for, fed and watered by such owner or con-

signee"; and that "such live stock is sold in the pen in which they are yarded." (Pr. Trans. 4, 33–34, 37). They are handled and sold there as they would be at the farm of the owner.

The District Court held that the pens of the Union Stock Yards, as they are shown in the information, were a "similar place" to an exchange or board of trade within the meaning of the Act. On the other hand, we contend that they are not in any respect such a similar place. They are similar to a farm or place where products or merchandise are present and sold at private sale.

So it is clear both from the information itself and from the evidence that the sales in the pens at the Union Stock Yards are not sales in any exchange or board of trade or other similar place within the construction which we have contended, and the line of distinction laid down by counsel for the government in the *Nicol case*.

The Live Stock Exchanges are not places of sale, and do not provide nor in any manner control the places of sale of live stock at the stock yards.

It may be said that there exist at different stock yards associations of dealers known as live stock exchanges, the character of two of which, made up of dealers at the Kansas City Stock Yards, was before

this Court in the cases of *Hopkins* v. *United States*, 171 U. S., 578, and *Anderson* v. *United States*, 171 U. S., 604; and counsel for the Government refers to those cases in his brief in the *Nicol case*. But of those the following facts are to be noted:

(1) Those cases had to do with the question whether the employment of commission merchants for the sales of live stock there in question or such sales of live stock, were interstate commerce, and with the nature and validity of the mutual agreements, and rules, and regulations of the members of the Live Stock Exchange.

(2) These live stock exchanges are not *places* at which sales are made. Schedule A of the Act in question, as we have stated, makes the *place of sale* the distinctive criterion. The tax is levied upon sales made "at any exchange or board of trade or other similar place." The sale here in question was not at a live stock exchange, but in a cattle pen of the Union Stock Yard and Transit Company. Those live stock exchanges, as appears in the cases cited, are mere associations or mutual agreements of men, for the regulation of the conduct of their members. No sale is or could be made at them. They provide no place at which sales are made or business is transacted, and attempt to exercise no sort of control over or regulation of the stock yards or any part thereof,

or the pens where the sales are made. The stock yards are owned and conducted and controlled by the stock yard company. All of that appears in the records of the cases cited, and fairly appears from the opinions of this Court therein. The live stock in the yards are cared for by the owner or consignee.

There are many associations known as exchanges which are not places and do not provide places where sales are made. At Chicago there are a Builders' and Traders' Exchange, a Gravel Roofers' Exchange and the Commercial Exchange, made up of wholesale grocers; the Lumbermen's Association of Chicago; the Flour and Feed Dealers' Association, etc. And so in other cities. No sales are made at these exchanges or associations.

(3.) Sales at the stock yards and in their pens need not be, and are not, in all cases, made by members of these live stock exchanges, nor by commission merchants. Any person may there sell or buy. That appeared in the record of the *Hopkins case* above referred to (p. 166); and it further appeared from the allegations of the bill of complaint of the United States, and from the answer and evidence in that case, that the stock yards at which the sales were made were owned, controlled, operated and managed by the Kansas City Stock Yards Company. And this also appears from the report and opinion

in the case in this court. And it appears from the record in the case at bar that the Union Stock Yard and Transit Company do own and control the yards at Chicago. (Pr. trans. 4.) And that the live stock in the yards are cared for by the owner or his agent. And it also appeared by the record in the *Hopkins case* that persons owning live stock and desiring to sell the same at the Kansas City Stock Yards are under no obligation whatever to employ a commission merchant or a member of said exchange, but are at full liberty to act for themselves in making such sales, and said Kansas City Stock Yards Company extends to such persons all the privileges and facilities afforded by said company, that any persons desiring to purchase live stock may and do deal with and buy from the owners direct, and that any person who desires to buy cattle at said stock yards, although not a member of said Live Stock Exchange is at perfect liberty to purchase the same from any person whatsoever, and that the larger part of the cattle purchased for the purpose of being fed and improved in condition are purchased without the intermediation or employment of any commission merchant. (Printed Record in *Hopkins case*, pp. 166, 176, 178.) And it appears from the record in the case at bar, both from the information and from the evidence, that at

the Union Stock Yards at Chicago any person may sell or buy live stock. (Pr. Trans. 4, 35, 43-44.)

(4) Schedule A of the Act in question, as construed and applied by the District Court in this case in the instructions to the jury, does not confine the tax imposed to sales by members of any live stock exchange. There is nothing in the record whatever to show that the plaintiff in error is a member of a live stock exchange; or that the sale in question was made under any supposed privilege or advantage gained from membership of a live stock exchange; or indeed that one exists at the Union Stock Yards. But the court held that the *Union Stock Yards was a place similar to an exchange;* and under that ruling the tax imposed is upon *all sales* of live stock made at the Union Stock Yards. But if plaintiff were shown to be a member of the Chicago Live Stock Exchange, it would be of no sort of importance. The Government cannot claim that if a member of the Chicago Board of Trade or of the New York Stock Exchange, should sell products or merchandise at his office or farm or elsewhere than on the floor of the board of trade or exchange, such sale would be subject to the tax. The Chicago Live Stock Exchange is not a place; and no such place is known; and no sale could be made thereat.

The sale of cattle by the commission merchant is as a mere agent as shown by the *Hopkins case*, and is the sale of the principal or owner. And the sale may be made by the owner. In either case, under the ruling of the District Court, the Act in question levies the tax *upon the sale;* and so *the tax would fall upon the owner of the cattle whether the sale is made by an agent or by himself.*

It is, therefore, immaterial that live stock exchanges exist which are mutual associations for the regulation of the business conduct of their members, and are made up of dealers at the stock yards, but which are not themselves and which do not provide places for trading. No sales of live stock are made at such exchanges.

And in the case at bar the information did not aver nor did the District Court adjudge that the sale in question was made at one of these live stock exchanges. And no sale was ever so made. This case proceeded entirely on the basis, and the Court so instructed the jury that *the Union Stock Yards was a place similar to an exchange or board of trade.*

It appears from the evidence that the Union Stock Yard and Transit Company have in the stock yards an office building, and that in this building the commission merchants have their offices, which they rent from the Union Stock Yard and Transit Company.

But the sales are not in or at that building; but, as averred in the information and proved, they are made *in the cattle pens* in the yards in which the stock sold is confined. There are some 5,000 of these pens, which cover about 200 acres. (Print. trans. 4.) The pen in which an owner's cattle are for the time confined is his pen, in which he or his consignee and agent cares for his cattle and sells them as he might in the yards or pens on his own farm.

III.

If it was competent for Congress, as contended by counsel for the Government in the Board of Trade cases to put into a class for the purposes of taxation sales made on 'Change, it is not possible to bring within that class sales of cattle in the pens of the Union Stock Yards, and still preserve the uniformity required by the Constitution.

We are not here called upon to argue the question of the constitutionality of the War Revenue Act of 1898, as applied to sales upon the floor of the Chicago Board of Trade or of other exchanges which afford to their members only a place for trading with each other. That has been very ably and convincingly presented by the counsel for the appellants in the *Chicago Board of Trade Cases* above mentioned. As we have before stated, if their arguments shall prevail, and it be held in those cases that the provi-

sions of Section 6 and Schedule A of the Act in question are unconstitutional, that decision will dispose of this case in favor of the plaintiff in error. But if in the *Chicago Board of Trade Cases* the provision of the Act in question, as applied to sales upon the floor of the Chicago Board of Trade, be held to be constitutional, for the reason laid down by the Circuit Judge in his opinion in the *Vicol case* and contended for by Mr. Solicitor General Richards in his brief in those cases, viz: that it was within the power of Congress to classify sales upon the floor of such an exchange as proper subjects for taxation, because of the privilege of there selling which members alone enjoy, and that the tax in question is imposed uniformly upon the members of that class,—still that decision would not control or determine the constitutionality of the Act as applied to sales of cattle in the pens of the Union Stock Yards at Chicago. If the exercise of the privilege of selling products or merchandise upon the floor of an exchange or board of trade, which is confined to the members of such association, is the criterion for the classification of the subjects of taxation, and if the Act, as applied to such sales, is held to be constitutional, as imposing a uniform tax upon all sales of that class,—that classification excludes the sale of cattle here in question. Here, as we have shown, the

seller of cattle in the pens of the Union Stock Yards exercises no privilege. Such right of sale is free to all. And this is not only so in fact, but it is necessarily so from the nature of the Union Stock Yard and Transit Company and the character and extent of its business. (Print. trans. 5 *et seq.*)

The judgment herein, construing and applying this Act to the sale in question, requires an arbitrary and unfair discrimination which is in violation of the Constitution.

It will be borne in mind that the evidence in this case shows that upon the arrival of live stock at the Union Stock Yards, such live stock is placed by the owner or consignee thereof or his agents in one or more of the pens, and is there cared for, fed and watered by such owner or consignee. That any person is at liberty to send, take or receive cattle, hogs or other live stock into the Union Stock Yards, and there place, or have the same placed, in a pen or pens, care for the same, and there sell any cattle belonging to him, or which he has the right to sell. That any person is at liberty to purchase there or negotiate for the purchase of such live stock; that sales of the live stock in the pens are at private sale; and that such live stock is sold in the pen in which they are yarded (Pr. Trans., 33–34). We have already shown that there is a very wide dissim-

ilarity between such sales at the Union Stock Yards and sales upon the Chicago Board of Trade, or the New York Produce Exchange, or the floor of any other similar association, where the property sold is not present and where the privilege of selling is confined to the members of the association. Now it requires no argument or words to show that the sales of live stock at these yards, while so unlike sales at an exchange or Board of Trade, are similar to sales in pens or yards of the owner of the live stock at his farm, or elsewhere, wherever he may own or hire the yards in which his live stock is placed. In other words, as a place of sale, the pens of the Union Stock Yards are similar to the pens of the owner of the live stock at his farm or elsewhere. The pens at the stock yards in which his live stock is for the time being confined are *his* pens, in which he or his agent cares for his live stock, and in which he may sell them. The only difference is that the owner, or his agent, pays to the Union Stock Yard and Transit Company a charge for yardage, or, in other words, for the use of the pen and the facilities for yarding and caring for the live stock. At his own farm or ranch, he provides those yards and facilities himself; but at other places along the road where he might be driving his live stock to or from his farm or

ranch, he would hire such yards and facilities as he does at the Union Stock Yards. It is a matter of common knowledge that cattle and sheep are driven to and from ranches and feeding grounds, and to and from railway stations, sometimes many hundred miles apart. At ranches or farms along the way, and at railway stations throughout the great West, are pens in which such live stock are confined and fed and watered, and from which, at railway stations, they are loaded or unloaded to and from trains. And it is well known that live stock is frequently sold at all of these places as well as in the pens or yards at the farm or ranch or in the pens of the stock yards in the various cities where such yards are to be found. It is a wellknown fact that at hundreds of railway stations throughout the stock-raising states and territories, *e. g.*, Illinois, Iowa, Missouri, Nebraska, Montana, Colorado, Kansas, New Mexico, Oklahoma, Indian Territory, and Texas, pens for live stock are maintained, where stock is yarded for hire and are cared for and fed and watered by the owners of the live stock, and loaded and unloaded; and that at such pens live stock is frequently sold. At distilleries there are pens for yarding and feeding cattle, and sales are made there. If the pens of the Union Stock Yards are to be held to be an exchange or board of trade, or other similar

place, within the meaning of Schedule A of the Act in question, and these other several pens and places above mentioned, in which the owner or consignee places and cares for and sells or buys live stock, are not, the Act is not based upon any classification nor uniform. Sales in the pens or yards, upon the farm or ranch are not capable of distinction. Sales at country fairs are similar. If the words "exchange or board of trade" in the Act are to have any wider meaning than that which we have above contended for, viz: the floor or hall of an exchange or board of trade, the privilege of selling upon which is confined to members and denied to "outsiders,"—then no line can be drawn which is based upon any proper grounds for classification. The classification, if there then is any, would be purely arbitrary. But the Government does not contend that the tax is imposed upon sales at the places above mentioned. But if the line is broken down which distinguishes sales made upon the floor of exchanges or boards of trade from all other sales, then there is not any possibility of classification within the requirement of uniformity.

There would be no basis for classification between sales of cattle, as products or merchandise, by the owner or his agent in the pens of the Union Stock Yards, and the sales of merchandise by the owner

thereof over the counters of the great department stores. In these stores, it is a well known fact that the owners of certain kinds of merchandise,—say hardware, or boots and shoes,—place their merchandise in the proper department in the store of another proprietor and pay such proprietor of the store for the right to sell or for the sale of their merchandise therein. Hither purchasers resort and buy the merchandise at the place where it is kept. There is much more similarity between the sales in such stores and the sales of cattle at the Union Stock Yards than there is between such sales of cattle and sales upon the floor of the Chicago Board of Trade or the New York Produce Exchange. But no such tax is required to be paid upon those sales.

There are certain districts in great cities which are given up in great part to the sales of vegetables and fruits, poultry and game, by commission merchants. South Water Street, in Chicago, is such a district in that city. Here the fruits from the fruit growing districts in their season are sent to the commission merchants whose stores are upon that street, and are there exhibited upon the sidewalk and in their stores and are there sold. And so with vegetables and poultry. Those sales are very similar to the sales of cattle at the Union Stock yards,—much

more similar than are the sales upon the Chicago Board of Trade or the New York Produce Exchange. And there is an association of those dealers for their mutual business advantage. But the Government imposes no tax under this provision of law upon those sales.

In another section of the city of Chicago, within a wide area of West Randolph street, known as the "Haymarket,"—celebrated for the great tragedy committed there, known as the Anarchist riots and murder,—the farmers bring in their hay and other products for sale each day during the season, and there traders, sellers and persons desiring to buy, resort and buy. Is this an exchange within the meaning of Schedule A of the Act in question? Such places exist in many large cities. The Internal Revenue Department requires the payment of no tax for any sales at such places under this Act. It is the construction of the Government, then, that sales at those places are not subject to the tax. But an attempted line of distinction or classification which includes within the subjects of taxation sales of cattle made in the pens of the Union Stock Yards, and at the same time excludes, as not within the tax, sales made at these other places mentioned, is purely arbitrary, and a tax so levied lacks the uniformity required by the Constitution.

In most counties, and in many towns, annual fairs are held at fixed places and prizes are offered for quality of products and merchandise, and products and merchandise are there sold and bought. They are not regarded by the Internal Revenue Department as exchanges or boards of trade, or other similar places, within this Act. But an attempted classification which excludes them and includes the sale here in question is entirely arbitrary.

The principle of uniformity and equality is fundamental in taxation in any system of free government. This is treated as axiomatic in all works of authority upon the subject. It was conceded in the argument for the United States in the *Income Tax Cases* (157 U.S. at p. 474–5), that there is a uniformity requirement involved in the very word "tax"; and that it is guaranteed by the Fifth Amendment to the Constitution. And it was stated by Mr. EDMUNDS in his argument in those cases that it is now understood that the equal protection of the laws which is guaranteed by the Fourteenth Amendment is given by the Constitution against Federal as well as State action; and that "it was not necessary to say that Congress is not to deny to anybody the equal protection of the laws, because no power was delegated to do such monstrous things." (157 U. S., 498.)

It was elaborately argued in the *Income Tax Cases*, and by counsel for appellants in the *Chicago Board of Trade Cases* that the requirement of the Federal Constitution that indirect taxes shall be uniform throughout the United States, requires not simply geographical uniformity but uniformity between individual taxpayers or members of a class. The counsel for the Government in the *Income Tax Cases*, on the other hand, while conceding that under other provisions and by the spirit of the Constitution there was a requirement of uniformity between individuals and members of the class, contended that this particular provision only required a geographical or territorial uniformity. In view of the thoroughness of the argument upon this question in the other cases referred to, the writers do not feel justified in imposing upon the court any elaborate argument on that question. It is enough, however, for the purposes of this case, that the underlying principles of taxation, and the spirit of the Constitution, and the principles of the Fifth and Fourteenth Amendments require that in the enactment of tax laws as well as other legislation the people of the United States shall, within a reasonable and attainable limit, be treated alike. This, as stated above, was substantially conceded by the counsel for the Government in the *Income Tax Cases* and by Mr. CARTER

in his argument for the appellees (157 U. S., 525-6).

It is submitted that the requirement that indirect taxes shall be uniform throughout the United States can have no practical meaning unless it includes uniformity as between the persons and subjects of taxation within the class. Not being according to the rule of population, as direct taxes are required to be apportioned, the uniformity must be according to the amount, or value or character of the property, or of the things taxed or there would be no uniformity.

The expression "territorial uniformity," for which the counsel for the government contended in the *Income Tax Cases*, would mean nothing without a classification based upon some real and reasonable distinction. It certainly does not mean that the indirect taxes levied upon each state, or upon each square mile, or upon each square acre, shall be uniform, one with the other, according to territory. Indirect taxes are not laid in any way according to territory. Used in any other sense than this the term "territorial or geographical uniformity" means what we contend for; that is, that in every part of the United States the same thing shall pay the same tax. But the question of uniformity here involved is a question of territorial uniformity in the only proper sense of that term. The tax is upon sales made at

certain places. It is the *place* where the sale is made which determines whether it comes within the tax or not. Now, to classify merely according to the place would clearly violate the requirement of territorial or geographical uniformity. Then, if the places the sales at which are held to be within the Act, are not properly distinguishable, with respect to a proper basis for classification, from other places the sales at which are conceded not to be within the Act, then plainly the requirement of territorial uniformity, in any proper sense of that term, is violated. In other words, the Government is driven to abandon its contention in the *Income Tax Cases* as to the meaning of the words of the constitution, "uniform throughout the United States." This Act would violate the territorial uniformity as there contended for. That the territorial uniformity for which counsel for the Government in the *Income Tax Cases* contended as the true construction of the the words "uniform throughout the United States," is violated, if the thing taxed,—whether a sale or other transaction or act,—is not taxed uniformly at all places, is laid down in the *Head Money Cases*, 112 U. S. 580. In other words, if the essential distinction between the thing taxed and the thing untaxed,—whether the subject of the tax be a sale or other transaction or act or thing, because the sale or other transaction or act or thing

is situated or takes place at the one place and not at another, then there is a plain violation of the requirement of territorial uniformity. And that is this case, if the tax is held to apply to sales of live stock like that here shown.

There is, we submit, a plain violation of the requirement of territorial uniformity in taxing a sale of cattle made by the owner or his agent in the pens of the Union Stock Yards at Chicago, while a sale of the same cattle by the same owner or his agent at the cattle pens at the railway station at Hayes City or Dodge City, Kansas, or at the pens or yard of the owner on his farm or ranch, or elsewhere is untaxed. It cannot be denied that the principle of territorial uniformity, for which counsel for the Government have so much contended in the *Income Tax Cases*, would be clearly violated by this Act which makes the place of sale the test of the classification. And while Mr. WHITNEY and Mr. Attorney General OLNEY in their argument for the United States in the *Income Tax Cases* contended that the words "uniform throughout the United States" required a geographical or territorial uniformity (157 U. S., 474–505), Mr. Solicitor General RICHARDS in the *Chicago Board of Trade Cases* seems to have given up this idea and conceded the contention of counsel for appellant Nicol, that the uniformity required applies as between

individuals as well as localities, and "is a uniformity within the created class." (Brief, p. 26.) Counsel finds that to justify this tax on sales upon the floor of exchanges and boards of trade if territorial uniformity were the test his case would fail. And he is compelled to appeal to a supposed "uniformity within a created class." But, plainly, the uniformity required is territorial and individual, in the sense that the same thing at every place and as to every person throughout the United States must be taxed alike.

Mr. Justice MILLER in his lectures on the Constitution, pp. 240-241, as quoted in the opinion of Mr. Justice FIELD in the *Income Tax Cases* 157 U. S., 594, said of taxes levied by Congress, that "the tax must be uniform upon the particular article," and that the uniformity required in State constitutions "must *refer to articles of the same class. That is, different articles may be taxed at different amounts, provided the rate is uniform on the same class everywhere, with all people and at all times.*" And the same distinguished jurist, speaking for this court, in his opinion in the *Head Money Cases*, 112 U. S., 580, 594, said that "the tax is uniform when it operates with the same force and effect in every place where the subject of it is found."

In *Kentucky Railroad Tax Cases*, 115 U. S., 321, 337, Mr. Justice MATTHEWS, in the opinion of the court, says of the classification of subjects for taxation, that "the rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents of each class, *so that the law shall operate equally and uniformly upon all persons in similar circumstances.*"

In *Magoun* v. *Illinois Trust and Savings Bank*, 171 U. S., 283, 293, the court, by Mr. Justice McKENNA, says that the equal protection of the laws requires "that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed." And this is taken from the opinion by Mr. Justice FIELD in *Hayes* v. *Missouri*, 120 U. S., 68, 71, who further quotes from the opinion in *Barbier* v. *Connolly*, 113 U. S., 27, 32, that "class legislation, discriminating against some and favoring others, is prohibited."

In *Bell's Gap Railroad Co.*, v. *Pennsylvania*, 134 U. S., 232-237, Mr. Justice BRADLEY, speaking for the Court, says that the classification of subjects for taxation, "so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the

State in framing their Constitution. But clear and hostile discrimination against particular persons and classes, especially such as are of an unsual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition,''

In *Gulf, Colorado & Santa Fe Ry. vs. Ellis*, 165 U. S. 150, Mr. Justice BREWER speaking for the Court, said that "such classification cannot be made arbitrarily," and that it "must always rest upon some difference which bears a reasonable and just relation to the Act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

It is submitted that if this Act is to be construed as it was construed by the District Court, so as to include within the subjects taxed the sale of cattle here in question, then the Act would violate the provisions of the Constitution requiring uniformity and the equal protection of the laws.

IV.

The phrase "or other similar place" in Schedule A of the War Revenue Act, if open to the interpretation given by the court below, is void for uncertainty and indefiniteness.

The phrase occurs in the second paragraph of Schedule A of the War Revenue Act. It is printed

in full on p. 25 of the Transcript. The immediate connection is as follows:

> "Upon each sale, agreement of sale, or agreement to sell, any product or merchandise at any exchange, or board of trade, or other similar place, either for present or future delivery, for each one hundred dollars in value of said sale or agreement of sale, or agreement to sell, one cent, and for each additional one hundred dollars, or fractional part thereof, in excess of one hundred dollars, one cent."

Then follow the provisions for the memorandum, and its contents, and finally the provision that any person liable to pay the tax, who makes such a sale without stamp, shall be guilty of a misdemeanor, and imposing punishment therefor at a fine of not less than $500.00 nor more than $1,000.00 or imprisonment not more than six months, or both.

The information charged in each count "a sale at a certain exchange and place similar to an exchange and board of trade" (Tr. pp. 2 and 3); and the instruction of the court to the jury confined the case to the selling at a "similar place." (Tr. p. 46.)

The instruction was as follows:

> "I will instruct you that it is your duty—that the evidence in this case shows that this defendant has violated the law; * * * that the stock yards is a place similar to an exchange, and transactions on the stock yards must be ev-

idenced by a memorandum in writing * * * The failure to stamp it is a violation of the law * * * I instruct you, gentlemen of the jury, to return a verdict of guilty."

The eleventh assignment of error specifically charges that this provision and phrase is void for uncertainty; that the words "or other similar place" in said Act contained, do not define or describe any place or kind of place with sufficient certainty to create any offense or impose any obligation.

This is reiterated in the specification of errors at the beginning of this brief. (Specification number thirteen.)

A consideration of this phrase, as a part of the definition of other crimes of place, will make its ininsufficiency apparent.

What would be said of a statute defining burglary as the breaking and entering with malicious intent, etc., of a mansion house *or other similar place?*

What would be said of a statute which forbade the disturbing of a school *or other similar place?*

What would be said of a banking statute which required the deposit of public securities by the banker or keeper of the place before opening a bank *or other similar place?*

What would be said of a statute which required saloons to be licensed, and forbade the keeping of a saloon *or other similar place* without license?

What would be said of an ordinance which, in order to raise municipal revenue, required every restaurant *or other similar place* to pay a special tax, and subjected to fine and imprisonment every person keeping such restaurant *or other similar place* without paying the tax?

What, indeed, would be said of an ordinance of the city of Chicago which required every exchange, board of trade, *or other similar place*, to pay a license fee and punished the keeping, unlicensed, of any such exchange, board of trade, *or other similar place?*

We submit that these questions suggest the common answer that the provision "or other similar place" is void for uncertainty: and that it must be so held in the War Revenue Act.

Without disrespect to the eminent statesmen who drafted the Act to provide a revenue for war expenditures, we cannot shut our eyes to the fact that the Act itself, like the necessity which called for it, was the result of a very sudden emergency. The Act was prepared with great haste. Seldom has so important and far-reaching a measure been passed with greater speed, and with less of that preliminary debate which resolves doubts and eliminates obscuri-

ties and leads to certainty. And again, without disrespect to the eminent statesmen who drafted the measure, we cannot avoid remembering the reflection of Lord COKE "upon Acts of Parliament overladen with provisos and additions, and many times *on a sudden penned* or corrected by men of none or very little judgment in law." (2 Coke, Preface.) And while we disclaim adopting that expression as a reflection upon the judgment of our legislators, we respectfully submit that the Act in question is one of those "on a sudden penned," and therefore embarrassed by the obscurity and indefiniteness which makes the phrase in question void.

Chancellor KENT defines statute law as "the express written will of the legislature rendered authentic by certain prescribed forms and solemnities." (1 Comm. Lect. XX; 14 Ed., *p. 447). And he significantly adds: "It is a principle in the English law that an Act of Parliament *delivered in clear and intelligible terms*, cannot be questioned or its authority controlled in any court of justice."

In *Hughes' Case*, 1 Bland's Chancery, 46, the learned chancellor, in construing a statute regulating partition proceedings, said:

> "Even upon English authority, a court of justice cannot be permitted in any case to legislate; (*Weale* v. *West Middlesex Wa. Comp.*,

> 1 Jac. & Wal. 371; *The Bank of Columbia* v. *Ross*, 4 H. & M'H. 456); and because, by the constitution of our Republic, (Dec. Rights, art. 6) the three departments have been directed to be kept forever separate, the judiciary has been expressly excluded from every species of legislation; and it is precluded from supplying any omissions of the legislature, however obvious or necessary it may be for attaining the object in view."

It is of the essence of a statute that it be an express command by the legislature, and that it be delivered "in clear and intelligible terms." And these requisites are the more important in cases of statutes defining crimes and denouncing penalties for their violation.

State v. *Boon*, 1 Tayl. (3 N. Car.), 246.

In that case (A. D. 1801) the defendant, it is said in the report, "was indicted on the third section of the Act passed in 1791, the words of which are 'that if any person shall be hereafter guilty of willfully and maliciously killing a slave, such offender shall, upon the first conviction thereof, be adjudged guilty of murder, and shall suffer the same punishment as if he had killed a freeman, any law, usage or custom to the contrary notwithstanding.'"

The whole bench held that the statute was too uncertain to sustain a conviction and arrested judgment. HALL, J. said:

"In case the person had killed a free man, what punishment would the law have inflicted upon him? Before this question can be solved another must be asked; because upon that, the solution of the first depends. What sort of a killing was it? or what circumstances of aggravation or mitigation attended it? Did the act bespeak such depravity of heart as would stamp it with the name of murder? Or were they such as justified it? If of the former sort, capital punishment should be inflicted upon the author of it: if of the latter sort, he is guiltless. That to which the legislature referred us for the purpose of ascertaining the punishment, proper to be inflicted is, in itself, so doubtful and uncertain, that I think no punishment whatever can be inflicted; without using a discretion and indulging a latitude, which in criminal cases, ought never to be allowed a judge."

The history of such an abortive piece of legislation is thus recapitulated by Mr. DWARRIS:

"By the 14 Geo. 2, c. 1, persons who should steal sheep, or any other cattle, were deprived of the benefit of clergy. The stealing of any cattle, whether commonable or not commonable, seems to be embraced by these general words, 'any other cattle,' yet they were looked upon as too loose to create a capital offense. By the 15 Geo. 2, c. 34, the legislature declared that it was doubtful to what sort of cattle the former Act extended besides sheep, and enacted and declared that the Act was meant to extend to any bull, cow, ox, steer, bullock, heifer, calf and

> lamb, as well as sheep, and to no other cattle whatsoever. Until the legislature distinctly specified what cattle were meant to be included, the judges felt that they could not apply the statute to any other cattle but sheep. The legislature by the last Act says that it was not to be extended to horses, pigs or goats, although all these are cattle (3 Bing., 581). Yet horses are cattle within the Black Act (2 W. Bl., 723), and bulls are not cattle within 3 Geo. 4, c. 71 (*Ex parte Hill*, 3 C. & P., 225)."
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> Potter's Dwarris on Statutes, Ed. of 1871, p. 248.

So in *Drake* v. *Drake*, 4 Dev. (15 N. Car.), 114, the Supreme Court, RUFFIN C. J., said:

> "Whether a statute be a public or a private one, if the terms in which it is couched be so vague as to convey no definite meaning to those whose duty it is to execute it, either ministerially or judicially, it is necessarily inoperative. The law must remain as it was, unless that which professes to change it be itself intelligible."

In that case the court held that a statute passed for the purpose of legitimating a natural son of the decedent had no effect except to change his name. The probable purpose was not expressed with sufficient definiteness to justify the court in taking a part of the decedent's property away from other persons who were heirs.

So in *State* v. *Purtlow*, 91 N. Car., 550; s. c., 49 Am. Rep, 652, (A. D. 1884), a statute prohibited the sale of spirituous liquors within three miles of Mt. Zion Church in Gaston County. There were two churches of that name in that county. It was held that the statute was inoperative and void for uncertainty. MERRIMON J., said:

> "But a statute must be capable of construction and interpretation; otherwise it will be inoperative and void. The court must use every authorized means to ascertain and give it an intelligible meaning; but if after such effort it is found to be impossible to solve the doubt and dispel the obscurity, if no judical certainty can be settled upon as to the meaning, the court is not at liberty to supply, to make one. The court may not allow 'conjectural interpretation to usurp the place of judicial exposition.' There must be a competent and efficient expression of the legislative will. * * * *
>
> "When the statute intends to refer to and embrace within its provisions one or more of a multitude of things of the same kind, or one or more persons of many of the same name, it must do so in some way or manner, in terms, or by reasonable implication, or appropriate descriptive words, to designate what things or persons are intended by it, else how can the court or a ministerial officer decide what things or persons are meant? A member of the legislature might say one thing or person was meant; another might

> say another thing or person was meant; a third might say yet another thing or person was meant; and thus the legislative will might entirely fail. The statute must speak. The legislative expression of its purpose and will must prevail; and if this does not appear with such a degree of certainty as that the court can learn what it is, the statute cannot operate."

The Supreme Court of Pennsylvania announced the same rule in *Commonwealth* v. *Bank of Pennsylvania*, 3 Watts & Serg., p. 173, at 177. There the State owned certain shares in a bank, and the statute aimed to provide a method of voting the shares of the State. The opinion of Chief Justice GIBSON quotes the statute and points out its uncertainty. He says:

> "We have seldom, if ever, found the language of legislation so devoid of certainty as in the provision before us. * * * What, then, is to be done? It would be easy, by an imaginary distribution, to place the State's shares in the hands of individuals, in such proportions as would produce any number of votes, even by an application of the scale (prescribed by the Charter, not the Act in question), which might be requisite to give either side a preponderance; but it certainly was not intended to give this court, as the interpreter of the proviso in the last resort, a power to control the event; and without assuming such a power, we are unable to arrive at any satisfactory conclusion. We are constrained, therefore, to say that no

valid election has been held, and that none can be held without further legislation."

So in *Leavitt* v. *Lovering*, 64 N. H., 607, 15 Atlantic Reporter, 414, the court had to deal with a statute prescribing the effect of assignments for the benefit of creditors upon attachments and conveyances. The particular provision involving the principle now under discussion, and the application of the principle to that Act, are thus stated by Mr. Justice CARPENTER:

> "Whenever an assignment to the judge of probate is made as provided by Section 1 of this Act, all attachments shall be void, except such as have been made three months previous to such assignment, and all payments, pledges, mortgages, conveyances, sales and transfers made within three months next before said assignment, and after the passage of this Act, *and before the 1st. of September next*, and also all payments, pledges, mortgages, conveyances, sales and transfers, whenever made, if fraudulent as to creditors, shall be void, and the assignee may recover and hold the property attached, mortgaged, conveyed, sold or transferred, as aforesaid, disencumbered of all such liens or claims. Laws, 1885, c. 85, 89. The unmistakable intent of the statute is to make void all payments, pledges, etc., made after the passage of the Act, and within three months next before the debtor's assignment. No effect consistent with this intent can be given to

> the words, 'and before the first of September next,' and they must be rejected as without meaning."

So in *Ward* v. *Ward*, 37 Tex. 389, the legislature had passed a statute, November 1st, 1861, which authorized appeals from interlocutory judgments, orders, or decrees, thereafter rendered by the District Courts, and required that such appeals "be regulated by the law regulating appeals from final judgments in the District Court, so far as the same may be applicable thereto." It was held that this statute was nugatory and void, for the reason that the statutes regulating appeals from final judgments were entirely inapplicable to appeals from interlocutory judgments.

The Court, WALKER, J., said:

> "Is the law one which, in its present condition, can be enforced? The first section gives the right of appeal to the Supreme Court from any interlocutory order, judgment or decree, entered in the District Court. The second section provides that appeals thus authorized shall be regulated as appeals from final judgments, so far as the law may be applicable. If, then, it is found that there is no law applicable which regulates appeals from final judgments, we are forced to the conclusion that the Act of November 1st, 1871, is nugatory and void. * * *
>
> "This is a matter of too great public im-

portance to be left to any uncertainty, or even to admit the courts to fix upon any rule of practice that could govern; and it is very doubtful whether any bond, where there is none provided for applicable to the case, could be made available. * * * * *

"We hesitate, to consider well any judgment of ours which declares unconstitutional or void an Act of the Legislature, paying due deference to the learning and wisdom of that branch of the government. But when we find ourselves totally unable to administer a law by reason of its uncertainty or ambiguity, or believe it to be unconstitutional, we shall not hesitate to discharge the duty which the law devolves upon us.

"We do not mean to say, by any means, that the Act of November 1st, 1871, is unconstitutional, but we do say that it is nugatory and void for want of some adequate provision in the law to carry out its execution."

In 1845, in *Green* v. *Wood*, 7 Adol. & El., Q. B. N. S. 178, the Court of Queen's Bench had occasion to construe a section of the Bankrupt Act then in force (St. 3, Geo. IV, C. 39), which provided that certain judgments by confession should be void, "unless such warrant of attorney or a copy thereof shall have been filed as aforesaid within the said space of twenty-one days from the execution thereof, or unless judgment shall have been signed *or* execution *issued* on such warrant of attorney within the

same period. The court applied the rule which we submit should be applied here. The following opinions were delivered:

> Lord DENMAN, C. J. We are bound to give to the words of the Legislature all possible meaning which is consistent with the clear language used. But, if we find language used which is incapable of a meaning, we cannot supply one. It is true that we have here words which, as they stand, are useless; a circumstance, perhaps, not altogether unprecedented. But, to give an effectual meaning, we must alter, not only "or" into "and," but "issued" into "levied." It is extremely probable that this would express what the Legislature meant. But we cannot supply it. Those who used the words thought that they had effected the purpose intended. But we, looking at the words as judges, are no more justified in introducing that meaning than we should be if we added any other provision. We can do no more than give such a meaning as the words authorize.
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> PATTESON, J. There is great difficulty in construing this Act. Look at sect. 3. A *cognovit actionem* is made void against the assignee unless filed within twenty-one days: yet afterwards a *cognovit* and warrant of attorney are treated as if they were on the same footing. It is clear to my mind that some mistake has occurred in drawing this Act, and that we cannot hope to give a meaning to the whole. If "or" in sect. 2 is not altered to "and," there is no meaning, for there cannot be execu-

tion without a judgment. We can give no meaning to the words "execution issued." If we do read "and" (which might possibly be justifiable if we could get a reasonable meaning by so doing), that will not be enough; for it is ridiculous to suppose that the Legislature contemplated an execution issued *pro forma*. And so we should be bound to say that "issuing" means "levying"; which, indeed, Mr. HAYWARD (counsel for plaintiffs) does contend for. I do not think we should be justified in doing so. It is best to say that the words have no meaning at all.

WILLIAMS, J. There is abundant authority for construing "or" to mean "and," if that would supply a meaning. But then comes the pressure of the difficulty. For it is admitted that this is not enough unless we go further, and say that "issued" means "levied." That is so violent a change that it amounts to framing a new section, instead of interpreting what we find. We are not authorized to do this. It is much safer to say that the words have really no meaning.

WIGHTMAN, J. How the mistake has arisen, it is not for us to say. It is admitted that, to give the effect required, we must do more than substitute "and" for "or," and must go on to hold that "issuing" means "levying." There is also another inaccuracy. Sect. 2 speaks of execution issuing "on such warrant of attorney"; here we have to add the words "on a judgment" before "on such warrant of attor-

> ney," to give any meaning at all. All this would amount, in truth, to the introduction of a new clause."

So in *Doe dem. Davenish* v. *Moffatt*, 15 Adol. & El., Q. B. N. S. 256 Lord CAMPBELL C. J., refers to the 4th section of Stat. 7 and 8 Vict. C. 76, as "ungrammatical and insensible."

So in *McConvill* v. *Mayor &c. of Jersey City*, 39 N. J., Law, page 38:

> "The Board of Alderman of Jersey City, acting under the charter of 1871, (*Pamph. L.*, 1871, p. 1094), passed the following ordinance: 'Sec. 1. No person shall drive, or cause to be driven, any drove or droves of horned cattle, (except milch cows), through any of the streets, avenues, &c., of Jersey City. Sec. 2. That any person, &c., that shall violate the provisions of this ordinance, shall, for every such offense, forfeit and pay the sum not exceeding $50." Sec. 24, pl. 5, of the charter, authorized the board to pass ordinances to regulate and control the driving of cattle, &c., through the streets, &c., of the city. The court held that it was bad for vagueness and uncertainty in the thing forbidden."

Mr. Justice WOODHULL said:

> "2. The next question is, does the ordinance sufficiently define the offence which it was designed to prohibit?
>
> "It has been well said that a by-law ought to be expressed in such a manner as that its mean-

ing may be unambiguous, and in such language as may be readily understood by those upon whom it is to operate. *Grant on Corp.*, 86. The same thing may be said of all laws, but the remark has a special significance as applied to such as are penal in their character.

"'It is impossible,' says Mr. DWARRIS, 'to dissent from the doctrine of Lord COKE, that Acts of Parliament ought to be plainly and clearly, and not cunningly and darkly penned, especially in penal matters.' *Dwar. on Stat.* 652.

"Brought to the test of these principles, the ordinance in question must, as it seems to me, be pronounced bad for vagueness and uncertainty in respect to the thing prohibited.

"It simply forbids the driving of any *drove* or *droves* of horned cattle, etc. Assuming the ordinance to be merely for the regulation and restraint, within reasonable limits, and not for the entire prohibition of the driving, etc., what are the limits within which such cattle may be driven through Jersey City?

"No person shall drive any *drove* or *droves*, etc., but how many cattle may be driven, etc., without incurring the prescribed penalty? If more than one at one time, how many more? A drove is defined by Webster to be 'a collection of cattle driven; a number of animals, as oxen, etc., driven in a body.' 'We speak,' he says, 'of a herd of cattle, and a flock of sheep, when a number is collected; but properly a *drove* is a herd or flock *driven*.'

"It cannot escape observation that the very words here used to describe or define the mean-

> ing of drove, namely, *collection*, *number*, *body*, *herd*, *flock*, are all of them essentially indeterminate, each one, as well as the word they are employed to explain, merely conveying the idea of an aggregation of units, without furnishing the slightest hint in answer to the question, how many."

So in *Johnson* v. *State*, 100 Ala., 32, s. c., 14 Southern Reporter, 629, the court held that a statute, providing that one who shall take away with intent to steal, or hold for reward, a dog registered under that act, "shall be punished on conviction as in other cases of larceny," was void for uncertainty, since it did not make dogs property, nor give them any value, nor state whether the punishment of grand or petit larceny should be imposed.

Tested by the requirement of clearness and freedom from uncertainty or indefiniteness, we submit that the phrase "or other similar place" in the War Revenue Act is void on principle; that the Act being a penal Act, and this case a proceeding to enforce the penalty, it should be pronounced void, as were the statutes questioned in the authorities here cited.

V.

If this tax applies to the sale of cattle here in question, then the tax is a direct tax and violates the rule of apportionment.

The question of what is a direct or indirect tax was argued with such thoroughness and consumate ability in the *Income Tax Cases*, and was so recently the subject of such thorough consideration by this Court, that we shall not inflict any further discussion of that question upon this Court. It is the settled law of this Court, as laid down in that case, that taxes on the rents or income of real estate are direct taxes, and that taxes on personal property, or on the income of personal property, are direct taxes (158 U. S., 637).

It is also laid down in a number of decisions of this Court that a tax upon the sale of merchandise is a tax upon the merchandise itself. *Brown* v. *Maryland*, 12 Wheaton, 419, 444; *Dobbins* v. *Commissioners*, 16 Peters, 435; *Almy* v. *California*, 24 How., 169; *Welton* v. *State of Missouri*, 91 U. S., 275; *Cook* v. *Pennsylvania*, 97 U. S., 566; *Pollock* v. *Farmers Loan & Trust Company*, 157 U. S., 581–2.

Mr. Solicitor General Richards, in his argument in the *Nicol Case*, contends that this tax is a tax upon the sale. Therefore it is a tax upon the property sold.

It is clear that this tax, as applied to the sale of live stock, falls directly upon the owner of the live stock making the sale or for whom it is made. The tax applies as much to the sale whether made by himself or made by others for him. Some of the authorities make the test, as to whether the tax is a direct or an indirect tax, the question whether taxes are paid by the owner without being recompensed by the consumer; or whether the tax falls on the use and not the possession; or whether the tax falls on the expenses or the consumption. (*Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S., 568–71.) But under these tests the tax here would seem to be a direct tax, as it falls directly upon the property and is paid by the owner making the sale.

CONCLUSION.

It is submitted that under a proper construction of said Act the sale of cattle in question and other like sales at the Union Stock Yards are not sales "at any exchange or board of trade, or other similar place"; and that the construction placed upon the Act by the District Court is erroneous; and that the as construed by that court, and as applied to the sale in

question, would be, and if that construction is correct, is in violation of the Constitution, and void; and that the same, if otherwise constitutional, is void for indefiniteness.

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